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Supreme Court of the United States

OCTOBER TERM 1942

No. 558

MRS. ELLA JAMISON,

Appellant

V.

STATE OF TEXAS,

Appellee

Appealed from the County Criminal Court, Dallas County, Texas.

APPELLEE'S BRIEF

H. P. KUCERA,
A. J. THUSS,
R. L. DILLARD, JR.,
Counsel for Appellee.

NICKS PRINTING CO., DALLAS

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APPELLEE'S BRIEF

To the Honorable Justices of the Supreme Court of the United States:

The appellant, a member of the religious sect known as Jehovah's Witnesses, was arrested on the public streets of the City of Dallas and charged with a vio-

lation of Article 140-7 of the 1941 Code of Civil and Criminal Ordinances of the City of Dallas. In the complaint she was charged with distributing advertising matter contrary to the provisions of the above mentioned article. The handbills distributed by the appellant contained on one side the announcement of a speech and on the other side an advertisement of two religious publications which could be purchased by sending 25c to the Watchtower Society, 117 Adams Street, Brooklyn, New York. The appellant defended the prosecution on the ground that the article was unconstitutional and void, because in contravention of the Fourteenth Amendment to the United States Constitution.

Appellee contends that this court has no jurisdiction to review the decision of the County Criminal Court of Dallas County where appellant has not applied to the Court of Criminal Appeals for Writ of Habeas Corpus.

COUNTERPOINTS

One

The court should dismiss this appeal because it has no jurisdiction to hear the same under Section 237(a) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, 43 Statutes at Large 936 (U.S.C.A., Title 28, Section 344(a)). The County Criminal Court of Dallas County is not the highest court in the State of Texas in which a decision in the suit could be had. Appellant could have applied to the

District Court of Dallas County for a Writ of Habeas Corpus, and if said writ had been refused by the District Court, appellant could have appealed to the Court of Criminal Appeals.

Two

This court should dismiss this appeal because a municipal ordinance is not "a statute of any state" within the meaning of Section 237(a) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, 43 Statutes at Large 936 (U.S.C.A., Title 28, Section 344(a)).

Three

This court should hold that the streets of the City of Dallas are public property to be used primarily for private purposes and that the City owes appellant no duty to furnish her a forum in which to practice her religious rites.

Four

This court should hold that where purported religious pamphlets also contain commercial advertising of books which the distributor is offering for sale, the distribution of such pamphlets on the public streets is not protected by the Fourteenth Amendment to the United States Constitution.

ARGUMENT UNDER COUNTERPOINT ONE

One

The court should dismiss this appeal because it has

no jurisdiction to hear the same under Section 237(a) of the Judicial Code as amended by Act of February, 13, 1925, Chapter 229, 43 Statutes at Large 936 (U.S.C.A., Title 28, Section 344(a)). The County Criminal Court of Dallas County is not the highest court in the State of Texas in which a decision in the suit could be had. Appellant could have applied to the District Court of Dallas County for a Writ of Habeas Corpus, and if said writ had been refused by the District Court, appellant could have appealed to the Court of Criminal Appeals.

Where the validity of the ordinance is challenged in the manner that the appellant does in this case, the ordinance must be judged upon its face. **Thornhill v. Alabama,** 310 U. S. 88, at 97, 98; **Carlson v. State of California,** 310 U. S. 106 at 111. In the Thornhill case there was an appeal by certiorari to this court from a conviction for violation of an anti-picketing statute. The proof was before this court as to the acts committed by the appellant in violation of the statute; yet the court said, "the section in question must be judged upon its face." Mr. Justice Murphy repeated the same statement in the Carlson case, involving similar facts.

The appellant admits that a further review of this case can be had in the Court of Criminal Appeals of Texas by a Writ of Habeas Corpus, where the validity of the ordinance would be judged by a consideration of the ordinance on its face regardless of its application to the facts. **Ex parte Largent,** 162 S. W. 2d 419 at 420, paragraph 1, and cases there cited; **Ex parte**

Robinson, 17 S. W. 1057; and **Ex parte Smith,** 102 S. W. 115. In the **Largent case** the Court of Criminal Appeals said:

> "If the ordinance is void upon its face, then this court has jurisdiction to so determine in this proceeding." (Habeas corpus proceeding).

Appellant contends that there is a distinction to be made between a direct appeal to this court and an appeal by writ of certiorari. This contention may be true, but it has no application to this case. Section 237(a) provides that appeal to this court does not lie until the appellant has obtained a judgment or decree from the highest court of the state in which a decision in the suit can be had. The language of this section does not limit appellant's necessity to seek a judgment of the highest court to direct appeal. The language of the statute does not exclude the requirement of proceeding for a writ of habeas corpus where such remedy is open in the state courts. It always has been the policy of this court to require that the appellant exhaust his remedies in the state courts before appealing to the federal courts; **Sharpe v. Buchanan,** 87 L. Ed. Advance Opinions page 188; see also the same case, 121 F. 2d 448; **Mooney v. Holohan,** 294 U. S. 103 at 115.

It is evident from the cases cited by appellant that the attack made on the ordinance is based on a contention that the ordinance is unconstitutional on its face. Hence, as we have pointed out above, the judgment of the County Criminal Court was subject to review by habeas corpus in the Court of Criminal Ap-

peals. **Ex parte Slawson,** 141 S. W. 2d 609 at 610, paragraph 1.

Appellant makes an attack on the case of **Ex parte Largent,** 162 S. W. 2d 419, but such attack is not justified under the facts of that case. The court obviously was correct in holding that the ordinance attacked by the relator was entirely valid on its face. This ordinance had been held valid by the Court of Criminal Appeals in numerous other cases. All of the cases cited by appellant here as being contrary to the decision in Ex parte Largent are clearly distinguishable from that case. In each of those cases, either the ordinance **or the complaint** under which the defendant was prosecuted revealed facts which showed that the ordinance was invalid as applied. In **Ex parte Largent** the complaint did not reveal that the relator was attempting to exercise a so-called religious rite. This Court denied certiorari, 87 L. Ed. Ad. Ops. 47.

Under appellant's contention this ordinance is invalid on its face regardless of the facts; therefore the judgment of conviction was subject to review by writ of habeas corpus in the Court of Criminal Appeals.

Appellant should have sought relief from the Court of Criminal Appeals before appealing to this court.

We respectfully refer the court's attention to the argument contained in Appellee's Motion to Dismiss this appeal heretofore filed herein.

ARGUMENT UNDER COUNTERPOINT TWO

Two

This court should dismiss this appeal because a

municipal ordinance is not "a statute of any state" within the meaning of Section 237(a) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, 43 Statutes at Large 936 (U.S.C.A., Title 28, Section 344(a)).

We respectfully refer the court's attention to the argument contained in Appellee's Motion to Dismiss this appeal heretofore filed herein.

ARGUMENT UNDER COUNTERPOINTS THREE AND FOUR

Three

This court should hold that the streets of the City of Dallas are public property to be used primarily for the purpose of travel and that the City owes appellant no duty to furnish her a forum in which to practice her religious rites.

Four

This court should hold that where purported religious pamphlets also contained commercial advertising of books which the distributor is offering for sale, the distribution of such pamphlets on the public streets is not protected by the Fourteenth Amendment to the United States Constitution.

The streets of the City of Dallas belong to the public and are primarily for the use of the public in the ordinary way. **Packard v. Banton**, 264 U. S. 140 at 144; **Stephenson v. Binford**, 287 U. S. 251 at 274. In the latter case the court says:

"First. It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. Packard v. Banton, 264 U. S. 140, 144, 68 L. Ed. 596, 607, 44 S. Ct. 257, and cases cited; Frost & F. Trucking Co. v. Railroad Commission, 271 U. S. 583, 592, 593, 70 L. ed. 1101, 1104, 1105, 47 A. L. R. 457, 46 S. Ct. 605; Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335, 337, 76 L. ed. 323, 326, 52 S. Ct. 144; Johnson Transfer & Freight Lines v. Perry (D. C.) 47 F. (2d) 900, 902; Southern Motorways v. Perry (D. C.) 39 F. (2d) 145, 147; People's Transit Co. v. Henshaw (C. C. A. 8th) 20 F. (2d) 87, 89; Weksler v. Collins, 317 Ill. 132, 138, 139, 147 N. E. 797; Maine Motor Coaches v. Public Utilities Commission, 125 Me. 63, 65, 130 Atl. 866."

This is the settled rule in Texas, and all other jurisdictions. **City of Waco v. West (Sup. Ct.)**, 294 S. W. 832; **City of Dallas v. Harris**, 157 S. W. 2d 710; **Ex parte Hogg** (Crim. App.), 156 S. W. 931; **Decker v. City of Wichita**, 109 Kan. 796, 202 Pac. 89; **Ex parte Dickey**, 76 W. Va. 576, 85 S. E. 781, L.R.A. 1915F 840; **Hadfield v. Lundin** (Wash.), 168 Pac. 516.

The power of the City over the streets is not limited to reasonable regulations but may go to the extent of an absolute prohibition. The power of the City is that of proprietor subject only to ordinary uses by the public. As the Supreme Court of Texas says in **City of Waco v. West**, 294 S. W. 832:

"The highways of the state, including streets

> of cities, belong to the state, and the state has full control and authority over them. They 'are the property of and for the use of the state, which, through its Legislature, has absolute control over same, which control it may or not, from time to time, delegate to the local authorities.' Robins v. Limestone County, 114 Tex. 345, 268 S. W. 915; Travis County v. Trogdon, 88 Tex. 514."

This power has been delegated to Home Rule Cities. Art. 1175, Sec. 18. R. C. S. Texas, 1925.

And as Mr. Justice Holmes says in **Commonwealth v. Davis**, 39 N. E. 113 (affirmed by this court, 167 U. S. 44):

> "As representative of the public it may and does exercise control over the use which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."

The leaflet distributed by appellant had on one side an advertisement soliciting the sale of certain books by the Watchtower Society of New York at 25¢ per copy, of which company she was, according to the evidence, a duly accredited agent. Under the circumstances the appellant was attempting to use the streets for gain and therefore the legislative body by reason of the City's proprietary interest in the streets could forbid such use. This court has recognized in

Jones v. Opelika, 316 U. S. 584, that the activities of this religious sect have assumed a commercial aspect. As Mr. Chief Justice Reed there says:

> "But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid." (Emphasis ours)

In the present case, appellant was not only distributing leaflets advertising the sale of books but admittedly had in her possession the books advertised, which she would sell and deliver on the street to anyone asking for one. Appellant contends that the sale of the books did not result in a profit to her and hence that the transactions did not assume a commercial aspect, but the same contention was overruled in **Jones v. Opelika**, where the court said:

> "It is enough that money is earned by the sale of articles."

In other words, no profit need accrue to the individual in order for the sale to assume a commercial aspect. The scheme here utilized by appellant or rather the publishing company is ingenuous. It could as well be argued that the price charged merely paid for the cost of printing and distribution. This would mean, of course, that the distributor would make no specific fee on the sale, but would receive a flat fee for his services in the distribution of the leaflets.

Appellant argues that any prohibitory ordinance is invalid and quotes from the Jones case, but actually a prohibitory ordinance very similar to the Dallas

ordinance was sustained by this court at its last term, where it was applied to commercial advertising. **Valentine v. Chrestensen,** 316 U. S. 52. The ordinance in that case not only prohibited the distribution of leaflets on **public** property but on **private** property as well, yet the court sustained the ordinance. The court said:

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. **We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.** Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct." (Emphasis ours).

Appellant contends further that because the leaflet contains an announcement of a speech which was to

be on a religious subject and not commercial, the rule in **Valentine v. Chrestensen** is not here applicable. But the leaflet in the Valentine case was **not** commercial either—on one side—yet the court applied the ordinance to the distribution of the leaflet. The appellant in the case at bar was attempting to cloak the commercial aspects of her leaflet by advertising a speech allegedly on religion. The appellant's acts therefore fall within the interdiction of the Valentine case.

Motives are always difficult to ascertain, but apparently this double-barrel leaflet was to avoid the effect of this court's decision in **Jones v. Opelika**, where members of appellant's religious sect were held subject to a license in connection with their sale of these books. Instead of making an outright offer to sell, appellant advertised the offer, and to sanctify her motives included an announcement of a speech which she quotes at length in her brief to demonstrate its religious character. It is apparent that appellant desired to avoid any licensing requirements of the City.

It is not necessary that the activities of appellant be entirely commercial before she is subject to the ordinance. As the court said in the Jones case:

> "Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge. But when, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded."

The Jehovah's Witnesses have consistently insisted that they are entitled to use the public streets as a forum to practice their religious rites. This is evident from the many cases which have been before this court. **Cantwell v. Connecticut,** 310 U. S. 302; **Jones v. Opelika,** 316 U. S. 583; **Schneider v. Irvington,** 308 U. S. 147; **Ex parte Largent,** 87 L. Ed. Advance Opinions 47; **Ex parte Killam,** 87 L. Ed. Advance Opinions 47; **Cox v. New Hampshire,** 312 U. S. 569; **Lovell v. Griffin,** 303 U. S. 444. Appellant says the practice of propagandizing her religious beliefs on the streets is a part of her religion.

We readily admit that the Fourteenth Amendment protects the freedom of religion and the freedom of speech, but we do not think that the law places any duty upon the City or the general public to furnish the Jehovah's Witnesses or any other religious sect with a forum in which to express their religious beliefs or practice their religious rites. One of the fundamental principles of the Constitution is that the state and the church are separate. Under the circumstances can we say that the public must furnish any religious sect with a place in which to practice its rites or disseminate its views?

Should the streets be used for conducting a mass, holding a communion, or for a religious dance of the Hopi Indians? Can this court approve one religious ceremony and reject all others, because the form of the ceremony differs?

Can the extent of the use by the religious sect be

the basis of whether or not it is to be allowed? Clearly, since religious ceremonies or rites vary, then to permit one and reject others would lead to a charge of discrimination and a denial of the equal protection of law. If that is the yardstick, then religious rites would become subject to the whims of the local legislature, to be permitted or denied depending upon the composition of the local legislative body, whose action would be supervised by this court and judged in the same light. Chief Justice Hughes said in **Cox v. New Hampshire,** that a person must observe traffic regulations on the street regardless of his religious belief. Justice Roberts said in **Schneider v. Irvington,** that a preacher could not establish his pulpit in a street intersection and hold services, because it would interfere with the movement of traffic. Does this not raise the real question, namely, has the State absolute control over its property or is it subject to the individual whims of a religous sect which desires, contrary to the will of the state, to use the State's property for its special benefit? To hold that it is subject to such whim is to hold that the State does not have legal sovereignty to control its property and that the State owes the duty to a religious sect to furnish it a forum for the practice of its rites.

Whether this or that religious rite will or will not constitute an unreasonable use of the street is a subject wholly unfit for judicial determination. The use to which streets and public property shall be put rests within the jurisdiction of the legislative body having control over such property. To hold that the State

can exercise only such control over public property as will conform with the religious views of a particular sect denies to the State its sovereignty. The State under the Federal Constitution owes to a religious sect the duty of non intereference with worship its own way, unmolested, **at the place or places** that the sect controls or has permission to use. It owes the sect the duty not to pass upon its methods of worship or belief, nor to pass any laws or enforce any legislation which would put it at a disadvantage compared to any other religious group, organization or belief. If the laws of the State do this, the State is not infringing upon any constitutional guarantee of freedom or religion.

Traditionally, the freedom of religion has been exercised in the temple, the synagogue, the church, the cathedral, and the home, and not in the public streets. Neither the Constitution of the United States or the Constitution of Texas requires that the City furnish public property for use as a place of religious worship. Manifestly, if the appellant attempted to propagate her views on another person's private property contrary to that person's wishes, she would be guilty of a criminal trespass. Subject to the ordinary public use, the City's proprietary rights in the streets are no less than those of a private owner. Never have the streets been considered the proper place for the exercise of religious ceremonies. The exercise of any of the constitutional freedoms is subject to limitations as to time, place or methods. As the court said in **Jones v. Opelika**, 316 U. S. 584 at 594:

"One man, with views contrary to the rest of his compatriots, is entitled to the privilege of expressing his ideas by speech or broadside to anyone willing to listen or to read. Too many settled beliefs have in time been rejected to justify this generation in refusing a hearing to its own dissentients. But that hearing may be limited by action of the proper legislative body to times, places and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order.

"This means that the proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism, any more than the civil authorities may hamper or suppress the public dissemination of facts and principles by the people. The ordinary requirements of civilized life compel this adjustment of interests."

Likewise, in **Cox v. New Hampshire**, 312 U. S. 569 at 574, Chief Justice Hughes says:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of

the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

The same principles are recognized in **Schneider v. Irvington,** 308 U. S. 147, one of the principal authorities upon which appellant relies in this case. Mr. Justice Roberts in that case says:

"For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no nec-

> essary relationship to the freedom to speak, write, print or distribute information or opinion."

Mr. Justice Sutherland said in **Village of Euclid v. Ambler Realty Company**, 272 U. S. 365:

> "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."

So it is with the exercise of a religion on a public street, especially when that religion has been commercialized as in this case. As the court pointed out in the Jones case, the exercise of constitutional freedoms may be limited as to place. The appellant argues that the ordinance is void because it is an absolute prohibition; but actually it is only a limitation as to place, which the court has said is valid. In the final analysis all regulatory measures are prohibitory in some respects. This does not render such regulations invalid a fortiori.

We repeat what we said in our Motion to Dismiss: there is a constitutional right to freedom **from** religion as well as a constitutional right to freedom **of** religion.

Appellant argues that if commercial advertising is excluded from the streets the great newspapers and magazines also will be excluded. We do not deny this, but still insists that no constitutional rights will be violated by such exclusion. The courts have almost uniformly held from early times that the exclusion of newspapers and commercial advertising from the streets violates no constitutional rights. **Common-**

wealth v. Kimball (Mass.) 13 N. E. 2d 18, 114 A. L. R. 1440, in cases collected in the note at 1446; **In re Anderson**, 69 Neb. 686, 96 N. W. 149, opinion by Pound; **City of Milwaukee v. Kassen**, 203 Wis. 383, 234 N. W. 352; **San Francisco Shopping News Company v. City of South San Francisco**, 69 F. 2d 879; **City of Manchester v Leiby**, 117 F. 2d 661; **Commonwealth v. Nichols** (Mass.), 18 N. E. 2d 166. This court made it plain in **Schneider v. Irvington**, 308 U. S. 147, that their holding did not apply to commercial activities. Judge Roberts says:

> "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires."

The court followed up this language in the case of **Valentine v. Chrestensen** by saying that such commercial advertising could be entirely excluded. This holding is entirely consistent with the overwhelming majority of the decisions in the state courts.

Appellant contends that the decision of the state court in this case conflicts with **Schneider v. Irvington**, 308 U. S. 147; **Hague v. C. I. O.**, 307 U. S. 496; **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106; and **Near v. Minnesota**, 283 U. S. 697. We think it apparent that these cases, when considered in the light of their facts, are not applicable to the present case. In the **Thornhill** case there was an absolute prohibition against picketing regardless of where it was conducted. In **Hague v. C. I. O.** the ordinance required a prior censorship of material and the facts showed a continued discriminatory course of

action by the municipal authorities. In **Near v. Minnesota** the court was not dealing at all with a handbill ordinance, but with an injunction suit to restrain the publication of a particular newspaper. Neither **Schneider v. Irvington** nor **Carlson v. California** involve the commercialization of constitutional freedoms, as we have in this present case. Admittedly we do not agree with the decision in **Schneider v. Irvington,** because it is obviously contrary to all the prior decisions of numerous state courts on the same question, wherein the courts have held that the city in the exercise of its proprietary rights in the streets could exclude from the street any person who is attempting to burden the streets with an extraordinary use, but we do not think it applicable.

The appellant is willing to criticize the officials of the City of Dallas for intolerance in enforcing this ordinance against her, but she demonstrates the ultimate in intolerance by making a pointed attack upon the Roman Catholic Church, a religious organization which she insists should be suppressed. We refer the court to the appellant's summary of the lecture, as contained in her brief.

Appellant argues that the decision in **Valentine v. Chrestensen** would mean the end of newspapers, but this is obviously untrue, since a newspaper does not depend upon distribution upon the streets for its continued existence. The great bulk of all newspapers are sold and distributed on private property. As we have repeatedly stated, the ordinance in the present

case is strictly confined to prohibition of distribution on public streets.

The fact that so many ctiies have passed ordinances of this character indicates to our mind at least that a large portion of the legislative bodies of this country have thought it in the public interest to prohibit commercial activities in the streets. Under the circumstances, how can this court say that no facts could exist which would support the exercise of legislative discretion?

As Mr. Justice Cardozo said in the case of **Williams v. Annapolis**, 289 U. S. 36 at 42:

> "It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. * * * The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the Legislature must have its way."

It may be that liberal political philosophy would insist that such use should be permitted of public property, but certainly the matter is not one which should be addressed to a court, but to the legislative body. The wisdom or desirability of allowing such a use of public property is a matter which lies exclusively with the judgment of the legislative body.

To hold that this appellant is entitled to conduct her form of religious ceremonies on the streets means

that this court must overrule the well-established rule that a municipality has the right to prohibit any extraordinary use of its streets. The court is then faced with the problem of hearing the complaint of every other religious body which desires to make some new and different use of the streets. This court would then be the body controlling the nature and extent of the use instead of the local legislative bodies, and thus the court becomes the licensing authority. The very magnitude of the task which would be imposed demonstrates the wisdom of the ordinance in excluding all religionists from the streets. The ordinance is equal in its operation and non-discriminatory. To say that a Jehovah's Witness can practice her religion on the streets because it only puts a small burden on the public user, and a Catholic cannot say mass on the streets because the burden is larger would certainly deny to the latter its equal protection of the law.

WHEREFORE, appellee respectfully submits that this appeal should be dismissed for want of jurisdiction, or in the alternative that the judgment of the trial court be in all respects affirmed.

Respectfully submitted,

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A copy of this brief has been furnished to Mr. Hayden C. Covington, 117 Adams Street, Brooklyn, New York, counsel for appellant.

SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1942.

Mrs. Ella Jamison, Appellant, *vs.* The State of Texas. | On Appeal from the Criminal Court of Dallas County, Texas.

[March 8, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The appellant, a member of the Jehovah's Witnesses, was charged with distributing handbills on the streets of Dallas, Texas, in violation of an ordinance of that city which prohibits their distribution. She was convicted in the Corporation Court of Dallas, and appealed to the County Criminal Court where, after a trial de novo, she was again convicted and a fine of $5.00 and costs was imposed. Under Texas law she could appeal to no higher state court,[1] and since she properly raised federal questions of substance in both courts, the case is rightfully here on appeal under Section 237(a) of the Judicial Code. *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100. The appellee has asked us to reconsider the doctrine of the *King Manufacturing Co.* case under which this Court takes jurisdiction on appeal from judgments sustaining the validity of municipal ordinances. We see no reason for reconsidering the *King Manufacturing Co.* case and follow it here.

We think the judgment below must be reversed because the Dallas ordinance denies to the appellant the freedom of press and of religion guaranteed to her by the First and Fourteenth Amendments of the Federal Constitution.

The stipulated facts show that the appellant, after three years of special training, had devoted many years to the work of the Jehovah's Witnesses. At the time of her arrest, the appellant was distributing handbills in an orderly and quiet manner to pedestrians whom she met on the street. On one side of the handbill was an invitation to attend a gathering in a Dallas park which was

[1] The Texas practice under which this is the highest state court to which appellant could appeal is considered in Largent v. Texas, No. 559, decided this day.

to be one of fifty simultaneous gatherings of Jehovah's Witnesses in as many cities to hear an address by a leader of the group on "Peace, Can It Last". The other side of the handbill repeated the invitation and described at the bottom two books which explained the Jehovah's Witnesses' interpretation of the Bible and set out their religious views. This was followed by a statement that the books would be mailed "Postage Prepaid on your contribution of 25¢". While the books were not actually sold on the streets, the appellant would have delivered them to the home of anyone who made the twenty-five cents contribution. The books would have cost her more than twenty-five cents.

The Dallas ordinance which is set forth in the margin[2] has been construed by the state court to forbid the distribution of leaflets by the appellant in the fashion outlined above.[3] The city seeks to uphold the ordinance here on the contention (a) that it is justified as an exercise of the city's plenary control of its streets, and (b) that appellant's activity may be forbidden because the leaflets include "commercial advertising of books which the distributor is offering for sale."

First. The city contends that its power over its streets is not limited to the making of reasonable regulations for the control of traffic and the maintenance of order, but that it has the power absolutely to prohibit the use of the streets for the communication of ideas. It relies primarily on *Commonwealth* v. *Davis*, 167 U. S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. *Hague* v. *C. I. O.*, 307 U. S. 496, 514-516. Of course, states may provide for control of

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2 "Scattering handbills, etc.—It shall be unlawful for any person to carry or hold by hand or otherwise, any billboard, show card, placard or advertisement, or to wear any costume for the purpose of attracting attention of the public, or to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the city of Dallas. Any person violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction, may be fined in any sum not exceeding one hundred dollars."

3 The complaint under which the appellant was convicted alleged that she did "carry, hold by hand, distribute, scatter and throw handbills as an advertising medium" in violation of the ordinance. It will be noted that the word "distribute" which does not appear in the ordinance, is a part of the complaint, and that the words "carry or hold by hand" which appear in the first clause of the ordinance as relating to billboards, et cetera, have been applied in the complaint as though relating to "handbills" which appear in the second clause of the ordinance in connection with papers scattered or thrown on the street.

travel on their streets in order to insure the safety and convenience of the traveling public. *Cox* v. *New Hampshire*, 312 U. S. 569, 574. They may punish conduct on the streets which is in violation of a valid law. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. *Hague* v. *C. I. O.*, *supra*; *Schneider* v. *Irvington*, 308 U. S. 147, 162. Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained.

Second. The right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances. This has been beyond controversy since the decision in *Lovell* v. *Griffin*, 303 U. S. 444. The city contends, however, that in the instant case the prohibition is permissible because the handbills, although they were distributed for the unquestioned purpose of furthering religious activity, contained an invitation to contribute to the support of that activity by purchasing books related to the work of the group. The mere presence of an advertisement of a religious work on a handbill of the sort distributed here may not subject the distribution of the handbill to prohibition. In *Schneider* v. *Irvington*, *supra*, we held that the city of Irvington might not forbid conduct almost precisely the same as that with which the appellant in the instant case is charged. Even where handbills carrying notice of a public gathering contained a statement of an admission fee, we held that they could not be barred from distribution on the streets. *Schneider* v. *Irvington*, *supra*, 154, 162, 163. No admission was to be charged at the meeting for which the appellant was circulating leaflets in the instant case. In *Cantwell* v. *Connecticut*, 310 U. S. 296, 305, we said that a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection.

The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have "a civil appeal, or a moral platitude" appended. *Valentine* v. *Chrestensen*, 316 U. S. 52, 55. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity

merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.

Reversed.

Mr. Justice FRANKFURTER acquiesces in the refusal to reconsider *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, although, for the reasons set forth by Holmes and Brandeis, JJ., dissenting, he deems that case to have been erroneously decided. Otherwise he agrees with the opinion in this case.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.